No. 88-152

In The
Supreme Court of the United States
October Term, 1988

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IN RE: All American Services, Ltd.,
Petitioner

—o—

ON WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

BRIEF OF RESPONDENTS EDWARD C. ABELL, JR. AND CAREY WALTON IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

—o—

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I.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider a petition for "certiorari" filed eleven months after entry of the mandate of dismissal.

2. Whether the Court should grant a mandamus based upon a petition styled as a petition for writ of mandamus which fails to establish the presence of exceptional circumstances and the unavailability of ordinary relief.

3. Whether an appellate court may dismiss and deny reinstatement of an appellant's appeal where the appellant failed to timely take steps required to prosecute its appeal and to seek reinstatement after dismissal.

II.

PARTIES TO PROCEEDING

Plaintiffs-Appellees-Cross Appellants (Respondents)

Edward C. Abell, Jr., Carey Walton, individually and as representatives of the class of purchasers of Westside Habilitation Center Revenue Bonds

Defendants-Appellants

Joe E. Fryar

Law Firm of Wright, Lindsey & Jennings
of Little Rock, Arkansas

Valley Forge Insurance Company

All American Service Company, Ltd.
of Hamilton, Bermuda (Petitioner)

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This Court Lacks Jurisdiction To Consider The Petition Which is Untimely.

Petitioner, All American Services Co., Ltd., ("All American"), a Bermuda corporation, seeks review of an order and mandate entered by the United States Court of Appeals for the Fifth Circuit on August 19, 1987, dismissing its appeal from the judgment in favor of the plaintiff class of purchasers of Westside Habilitation Center Revenue Bonds. Four months after the issuance of the mandate of dismissal by the Fifth Circuit, petitioner belatedly filed a motion seeking reinstatement of its appeal. Petitioner's motion was denied by an order dated December 16, 1987. Twenty-five days after entry of the order denying its motion for reinstatement, petitioner filed another belated motion requesting reconsideration of the Fifth Circuit's order denying reinstatement and/or the extraordinary remedy of suspension of the court's rules. The Fifth Circuit denied petitioner's motion for reconsideration and/or suspension of the rules by order dated February 5, 1988.

Subsequent to the rendering of the third order maintaining dismissal of petitioner's appeal, respondents proceeded to execute on the judgment against petitioner in favor of the plaintiff class. Pursuant to an order issued by the district judge on March 14, 1988, in excess of $3 million recovered from petitioner was distributed to members of the class located in 30 states, the District of Columbia and London, England and its counsel on approximately June 30, 1988.

Eleven months after issuance of the mandate of dismissal, nearly six months after rendering of the *second* order denying reinstatement, and one month after distribution of the funds to the plaintiff class, petitioner filed on July 26, 1988, a petition styled as a "Petition For Writ Of Mandamus" seeking for the first time review by this Court of the Fifth Circuit's order of August 19, 1987 dismissing its appeal. The petition is untimely; therefore, the Court lacks jurisdiction.

It is well established that an appeal from a civil decision or a petition for writ of certiorari must be filed with this Court within ninety days of the entering of the decree. 28 U.S.C. § 2101; Sup. Ct. R. 20. Although an extension of this time period may be granted, such extensions, which are not favored, are limited to an additional sixty days and must be justified by proof of good cause. 28 U.S.C. § 2101(c); *Kleem v. Immigration & Naturalization Service*, — U.S. —, 107 S. Ct. 484 (1986) (extensions are disfavored). Otherwise, this Court lacks jurisdiction to consider the petition. *Dept. of Banking v. Pink*, 317 U.S. 264, 63 S. Ct. 233 (1942) (where three month filing requirement was not complied with, petition for certiorari must be denied for want of jurisdiction); *Rust Land & Lumber Co. v. Jackson*, 250 U.S. 71, 39 S. Ct. 424, 63 L.Ed. 850 (1919) (Court could not entertain writ of certiorari filed after expiration of time period within which to file petition).

The petition here is untimely. The mandate dismissing the appeal was entered eleven months ago. No extensions of the time period with which to file have been sought or obtained. Accordingly, the deadline to file an appeal

or a petition for writ of certiorari lapsed in November, 1987, some eight months prior to the filing of the petition.

Indeed, even giving petitioner the benefit of the two subsequent orders denying reinstatement which were entered in response to petitioner's untimely motions for reinstatement does not save this petition.[1] The latest order of the Fifth Circuit denying reinstatement was entered on February 5, 1988. Again, no extension of time within which to file was sought or obtained. Accordingly, the time period within which an appeal or petition for certiorari should have been filed expired on May 6, 1988. This petition filed over sixty days after expiration of the deadline is untimely.[2]

Petitioner obviously attempts to avoid the time limitations imposed by Congress and the rules of this Court by disguising its untimely petition as a "Petition for Writ of Mandamus". Petitioner's attempts to hide a wolf in sheep's clothing are unavailing because even a cursory review of the petition reveals that it is nothing more than an untimely petition for writ of certiorari. Conspicuously absent from the text of the petition is any mention of the standard for granting the extraordinary

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1 The orders entered on December 18, 1987, and February 5, 1988 were in response respectively to petitioner's Motion To Reinstate filed on December 2, 1987, and its Motion For Reconsideration filed on January 11, 1988. These notices which were filed four and five months respectively after the mandate of the Fifth Circuit Court of Appeal was entered on August 19, 1987, themselves were untimely and should not be construed to somehow give petitioner additional time within which to file. (App. A at A-14; App. B at A-17)

2 The petition would be untimely even if the permitted sixty day extension of time had been granted.

writ of mandamus or the specifications required by Rules 26 and 27 of this Court's Rules regarding the presence of exceptional circumstances warranting the exercise of the Court's discretionary powers and the unavailability of ordinary relief. Instead, petitioner consistently refers to rules and jurisprudence applicable to petitions for the writ of certiorari. For example, on page three of the petition, petitioner admits that certiorari is sought, referring to Rule 17.1(a) pertaining to petitions of certiorari. Similarly, on pages 4 and 6, reference is made to jurisprudence supporting the grant of certiorari, not the writ of mandamus. Other than in the title of the petition and implicitly by reference to 28 U.S.C. § 1651, mention of the writ of mandamus is absent from the petition.

Discarding petitioner's veiled attempt to disguise its untimely petition, it is patently obvious that the petition is a petition for writ of certiorari. Accordingly, the petition is untimely, and the Court lacks jurisdiction to consider it.

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VI.

STATUTES AND RULES

VII.

STATEMENT OF THE CASE

1. Background.

This action was instituted on July 5, 1984, by respondents, Edward C. Abell, Jr. and Carey Walton, individually and as representatives of the class of purchasers of Westside Habilitation Center Revenue Bonds, for violations of federal and state securities laws, state law fraud, and the Racketeer Influenced Corrupt Organizations Act. Respondents' claims arise out of a scheme to defraud bondholders embarked upon by, among others, defendant Joe E. Fryar ("Fryar") and the petitioner, All American, a Bermuda corporation organized and controlled by Fryar.

An integral part of the scheme to defraud involved inflation of the price of the bonds by over $2.3 million through a fraudulent real estate transaction. Particularly, Fryar acquired a vacant school building in Cheneyville,

Louisiana for $100,000.00, upon which Westside Habilitation Center, an intermediate care facility for the mentally retarded, was to be constructed. In an attempt to divert a significant portion of the bond proceeds for his own use, Fryar caused the property to be sold for $150,000 to All American, a Bermuda corporation formed at Fryar's behest as a vehicle to accomplish the fraud.

Immediately prior to the issuance of the bonds, Fryar caused All American to sell the Cheneyville property to the not-for-profit entity organized for purposes of issuing the bonds, Westside Habilitation Center, Inc. ("Westside"). The price paid by Westside for the very same property, which had not been improved since it was sold for $150,000, was $2,459,700.

Pursuant to a certain Development Agreement between Fryar and Westside, Fryar himself was to purchase and deliver bonds in an aggregate principal amount of $2 million to a trustee. Thus, Fryar was to have $2 million of his own funds at risk as security for the performance of his obligations, a fact expressly used to induce investors to purchase bonds. In furtherance of the scheme, however, $2 million of the grossly inflated purchase price was used to purchase $2 million of Westside bonds which were then pledged to secure performance of Fryar's obligations under the Development Agreement. Hence, by interposing All American in the transaction, Fryar was able to hide the fact that the price of the real estate had been grossly inflated and that he was not using his own monies to purchase the Westside bonds that ultimately were pledged to secure his performance. All American was paid interest at the rate of 16½% on the $2 million of

Bonds obtained through the fraudulent scheme. As of the date of trial, December 8, 1986, All American had received $2.8 million of Bonds and in excess of $800,000 in interest as a result of the fraudulent scheme. (App. C at A-18).

The trial court found that All American was "organized for the express purpose of concealing that a profit in excess of $2 million was to be made on the sale of the Cheneyville property". (App. D at A-19 [p.16]). The evidence established that All American had engaged in no business other than the transaction at issue (App. E at A-22) and had no paid employees other than the president, who formerly did secretarial work for the alleged original owner and who admitted to having no knowledge about the transactions at issue or the litigation itself. (App. F at A-23). All American's alleged present owner is a Cayman Island corporation which refused to produce a representative to appear at trial. (App. G at A-24). Its only assets are Westside Bonds received through the fraudulent scheme, and interest paid on the Bonds. At the time of trial, in excess of $700,000 of the interest paid on the Westside Bonds was on deposit in Bermuda banks beyond the jurisdiction of the Court. (App. C at A-18).

2. All American's Actions In The Trial Court.

Throughout this litigation, All American exhibited a cavalier attitude toward this country's rules of procedure. Particularly, because the relationship between Fryar and All American was a central issue in the litigation, respondents vigorously sought to discover information regarding this relationship and the nature of All American's participation in the Westside project. Disregarding the discovery rules, All American concealed documents, fabricated

documents, threatened a witness to prevent his appearing to testify, and refused to comply with the trial court's order to produce at trial representatives and parties within its control. For example, although for two years plaintiffs sought by subpoenas and requests for production to obtain all documents from All American pertaining to the transaction at issue, on the eve of trial All American produced previously undisclosed *copies* of documents purporting to be corporate records of All American, correspondence between All American and Fryar, and correspondence between All American and its counsel.

The originals of the "new documents" were not produced, notwithstanding the questionable authenticity of the copies. The trial court noted the suspicious nature of these "new documents" in its reasons for denying motions for Judgment Notwithstanding The Verdict.[3] (App. D at A-19 [pp. 19-20, 27]).

All American's attempt to circumvent the rules goes far beyond its concealment and fabrication of documents. It also interfered with discovery by threatening a witness to dissuade him from testifying. Prior to trial, respondents sought to take the deposition testimony in Bermuda of All American's officer and auditor, Ian Fleming. Mr. Fleming's testimony was critical because All American had consistently produced as representatives persons with no personal knowledge of the transactions. These persons,

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[3] For example, the trial court described one of the "new documents" as "a *copy* of a resolution, with no available original, which resolution was not produced during discovery and which mysteriously appeared during the course of the trial". (App. D at A-19 [pp. 19-20]).

in fact, testified that Mr. Fleming was more competent to testify on the matters at issue. Although Mr. Fleming originally agreed to appear for his deposition, he failed to appear and moved through an attorney who had represented All American to quash the order directing his appearance. Mr. Fleming's change of heart resulted from threats by All American to dissuade him from testifying, as established by a telex discovered during trial. (App. H at A-25).[4]

All American's disregard for our legal system extended to its own counsel, whom All American refused to pay for representing it during the nine week trial, although it had on deposit in excess of $700,000 with which to do so. (App. C at A-18).

3. All American's Actions On Appeal.

All American's callous disregard for rules and obligations continued on appeal. Other than filing a notice of appeal on April 22, 1987, All American took no action to prosecute its appeal for eight months. Contrary to the Federal Rules of Appellate Procedure and the Fifth Circuit's Local Rules, All American failed to order and arrange to pay for the transcript within the fifteen day time period. More importantly, All American consistently ignored the Court's warnings regarding its inaction.

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[4] After a two day evidentiary hearing during trial, the trial court held that although the telex came from Bermuda (App. I at A-27), its probative value was outweighed by the prejudicial effect. The trial court further held that because All American had refused to produce Mr. Fleming and Mr. Quin, its Bermuda attorney and the addressee of the telex, pursuant to its earlier order, it would submit a jury instruction regarding the adverse inference of their failure to testify.

Approximately one month after the period had expired, the Fifth Circuit admonished All American regarding the consequences of its failure to comply with its obligation to pay for its share of the transcript. (Petitioner's App. J at A-25). All American ignored the Court's warning, failing to take any action or to respond to the Fifth Circuit.

Two months after issuing its warning and three months after the date by which All American was to order and arrange to pay its share of the transcript, All American's appeal was dismissed pursuant to an order and mandate rendered by the Fifth Circuit on August 19, 1987. (Petitioner's App. B at A-7). All American neither moved to reinstate its appeal nor contacted the Court to attempt to explain its inaction. Rather, All American simply abandoned its appeal, totally ignoring the dismissal.

Consistent with the Fifth Circuit's dismissal of its appeal, All American thereafter neither sought nor obtained an extension of the October 6, 1987 due date for its appellate brief. (App. J at A-28).[5] Rather, All American again elected to simply do nothing, ignoring its appeal and the appellate rules.

Four months after dismissal of its appeal and two months after its brief was due, All American sought to reinstate its appeal, suggesting to the Fifth Circuit that

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5 Because the Fifth Circuit had already dismissed All American's appeal without objection for failure to pay its proportionate share of transcription costs, respondents did not seek to "redismiss" the appeal for All American's failure to timely file a brief.

the intervening eight months were required to solidify fee arrangements with counsel. (App. A at A-14). The Fifth Circuit denied the motion by order dated December 18, 1987.

Twenty-five days after entry of the order denying its Motion For Reinstatement, All American requested reconsideration of the ruling and/or the extraordinary remedy of suspension of the Court's rules. (App. B at A-17). Although it initially argued as grounds for reinstatement that eight months were required to solidify fee arrangements with counsel, All American abandoned that argument in its Motion For Reinstatement. Instead, All American suggested for the first time that confusion resulting from the filing of motions and the delay in filing of the transcript somehow justified its total disregard for the Fifth Circuit's rules, notwithstanding its receipt of explicit notices regarding its obligations from the Clerk of Court. The Fifth Circuit denied All American's Motion by order dated February 5, 1988.

Thereafter, All American did nothing. It did not seek reconsideration of the order by the *en banc* court. It neither filed a petition for a writ of certiorari nor sought an extension of the time within which to do so. Rather, again ignoring laws and rules governing our courts, All American simply did nothing for over five months until it filed its Petition For Writ Of Mandamus on July 26, 1988.

In the meantime, in reliance upon well-established principles regarding finality of litigation, respondents proceeded to execute on their judgment against All American. Specifically, they caused the seizure and sale of the only assets of All American in this country. Thereafter, pursu-

ant to an order of the district court entered on March 14, 1988, the proceeds from the sale of All American's assets were distributed to 464 class members nationwide and plaintiffs' counsel.[6]

Now, eleven months after the entry of the mandate of dismissal, five months after the entry of the third order maintaining the dismissal and one month after distribution of the proceeds of the sale of All American's assets to in excess of 450 persons and the holding of oral argument on the appeals of the remaining defendants, All American seeks to resurrect the litigation by filing an untimely petition for writ of mandamus.

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VIII.

SUMMARY OF THE ARGUMENT

1. The Court lacks jurisdiction to consider the untimely petition. The petition, in effect, is a petition for writ of certiorari seeking review pursuant to Supreme Court Rule 17 of the Fifth Circuit's order dismissing its appeal. Pursuant to 28 U.S.C. § 2101 and Supreme Court Rule 20, a petition for writ of certiorari must be filed within ninety days of the rendering of the decree, absent an extension for good cause shown. Here the decree to be reviewed was rendered on August 19, 1987 or at the latest on February 5, 1988. No extension of time was obtained. The petition was filed more than ninety days after either

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[6] Also occurring since the final order denying reinstatement were the filing of briefs by the remaining parties and the holding of oral argument on June 6, 1988.

date. Accordingly, the petition is untimely and cannot be considered.

2. Petitioner has failed to satisfy its burden of proving that its right to issuance of the extraordinary writ of mandamus is clear and indisputable. Petitioner has failed to establish, as required by Supreme Court Rule 26, the presence of exceptional circumstances warranting the exercise of the Court's discretionary powers or that adequate relief could not have been had in any other form or from any other court.

3. The Fifth Circuit Court of Appeals properly dismissed petitioner's appeal pursuant to Rules 3(a) and 10(b) of the Federal Rules of Appellate Procedure and Rule 42 of the Fifth Circuit's Rules. Petitioner, which did absolutely nothing for eight months after filing a notice of appeal and ignored the Fifth Circuit's admonition regarding the possible consequences, failed to fulfill the responsibility of appellant, rendering its appeal subject to dismissal. Petitioner's total inaction thereafter justified denial of petitioner's motion for reinstatement.

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IX.

ARGUMENT

1. The Court Lacks Jurisdiction To Consider The Untimely Petition.

For the reasons discussed above, the petition is untimely. The Court, therefore, lacks jurisdiction to consider it.

2. Petitioner Has Failed To Establish Entitlement To The Extraordinary Remedy Of Mandamus.

Assuming arguendo that the petition should be considered as seeking a writ of mandamus, the petition should be dismissed because petitioner has failed to establish entitlement to the extraordinary remedy. This Court long ago declared that the writ of mandamus is an extraordinary remedy, issuable only when no other remedy is available to redress an usurpation of power. *See e.g. Will v. United States*, 389 U.S. 90, 95, 88 S. Ct. 269, 273 (1967) ("it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy"). The writ is not a substitute for an appeal and is not available if an appeal could have been invoked. *Kerr v. U.S. District Ct.*, 426 U.S. 394, 402-403, 96 S. Ct. 2119, 2124 (1976); *International Business Machines Corp. v. Levin*, 579 F.2d 271 (3rd Cir. 1978); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27-28, 63 S. Ct. 938, 942-943 (1943).

Because of the extraordinary nature of the writ of mandamus, the party seeking the writ has the burden of showing that its right to issuance of the writ is clear and indisputable. *Will v. U.S.*, 389 U.S. 90, 95-86, 88 S. Ct. 269, 273-274 (1967). To establish entitlement to the writ, the moving party must establish specific elements enumerated by this Court's rules. Specifically, Rule 26 provides in pertinent part:

> To justify the granting of any writ under [28 U.S.C. § 1651], it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that

adequate relief cannot be had in any other form or from any other court.

All American's petition falls woefully short of satisfying the criteria required by Rules 26 and 27. All American has offered no explanation regarding why other relief was not available. All American could have appealed or timely sought a writ of certiorari for review of the Fifth Circuit's decision. Its failure to do so does not constitute exceptional circumstances. Indeed, All American has offered no justifiable excuse for its tardiness in seeking review by this Court of orders entered eleven and five months ago. Nor has it suggested why it could not have timely sought a writ of certiorari to review those orders. Nor has All American offered any authority permitting a party which took absolutely no action for five months after the rendering of the *third* order dismissing its appeal to seek review by the extraordinary writ of mandamus. Nor is there authority for such review. To the contrary, the purpose of the time limitations imposed by the United States Code and this Court's rules are to ensure there is an end to litigation. *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 63 S. Ct. 1126 (1943) (purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end). A party simply is not permitted to ignore the time limitations and at its whim resurrect, without explanation, litigation its opponents justifiably had assumed had ended. Otherwise, litigation would have no finality.

In short, the circumstances here clearly do not warrant the granting of a writ of mandamus on behalf of a party who has done nothing for five months. Indeed, re-

spondents, who have properly assumed that the litigation with All American was final, would be severely prejudiced by the granting of the writ.[7]

3. The Fifth Circuit Court Of Appeals Properly Dismissed And Denied Reinstatement Of Petitioner's Appeal Pursuant To Rules 3(a) And 10(b) Of The Federal Rules Of Appellate Procedure And Rule 42.3.2 Of The Fifth Circuit's Rules For Failure To Fulfill Its Appellant Responsibilities.

a. The Fifth Circuit Properly Dismissed The Appeal.

All American's appeal was dismissed on August 19, 1987 for want of prosecution based on its failure to order and arrange to pay for the transcript within the time period provided. The order of dismissal was entered three months after the date by which All American was to make such arrangements and two months after the Court admonished All American regarding the consequences for failing to comply with its obligation. The dismissal of All American's appeal was proper.

Rule 42.3.2 of the Fifth Circuit's Rules and Rules 3(a) and 10(b) of the Federal Rules of Appellate Procedure provide for dismissal of an appeal where an appellant fails to fulfill his responsibilities. Fed. R. App. P. 3(a), 10(b); 5th Cir. Loc. R. 42.3.2; *see e.g. Pyramid Mobile Homes, Inc. v. Speake*, 531 F.2d 743 (5th Cir. 1976) (dismissal of appeal for failure to timely obtain record); *Stevens v. Security Pacific National Bank*, 538 F.2d 1387,

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[7] Not only would respondents have to rebrief and reargue the case, they also would have to attempt to recover the proceeds distributed nationwide to the 464 members of the plaintiff class, a difficult, if not impossible task.

1389 (9th Cir. 1976) (failure to file proper brief justifies dismissal); *Business Forms Finishing Service, Inc. v. Carson*, 463 F.2d 966 (7th Cir. 1971) (appeal dismissed for failure to comply with Rules). As explained by a leading commentator on the Federal Rules:

> When an appellant fails to take any of the steps required by the Rules, Rule 3(a) permits the Court of Appeals to take such action as the Court of Appeals deems appropriate, which may include dismissal of the appeal.
>
> 9 Moore's Fed. Practice
> 203.12 at 3-58 (2d ed.) 1987.

Pursuant to these rules, appellate courts have dismissed appeals under less egregious circumstances. In *Taylor v. S & D Enterprises, Ltd.*, 601 F.2d 175 (5th Cir. 1979), the Fifth Circuit dismissed an appeal where the appellant delayed three months and twenty-six days in making satisfactory arrangements for preparation of the transcript, notwithstanding that the appellant timely applied for extensions of time. The court explained:

> It thus appears that, while the notice of appeal was timely filed, three months and twenty-six days passed without any action having been taken by appellants to perfect the appeal. *Thus, the filing of the notice of appeal was treated by appellants merely as a taking of an option to appeal the case should appellants later determine to do so.*
>
> The failure to order the transcript in anything approaching a timely fashion has not been due to excusable neglect, oversight, accident, or other fortuitous events. . . . Under such circumstances, it is appropriate that Rule 10(b), Federal Rules of Appellate Procedure, be invoked and that deliberate failure to abide that Rule result in a denial of the motion for extension of time.

> The second motion to extend the time is DENIED and the appellant's appeal is DISMISSED.
>
> 601 F.2d at 176
> (Emphasis supplied).

In *Taylor,* the appellant's appeal was dismissed three months after filing of the notice, notwithstanding that the appellant had made some effort to attempt to fulfill his obligations and *had timely filed motions for extension of time.* Nevertheless, the court held that the appellant's deliberate failure to abide by the rules justified dismissal.

In like manner, All American's deliberate failure to abide by the rules within four months after filing its notice of appeal, notwithstanding the Fifth Circuit's admonition regarding the consequences for failure to do so, justified dismissal. If in *Taylor* the dismissal was warranted, notwithstanding that the appellant had made some effort to comply with his obligations and at least filed motions for extension, then, *a fortiori,* dismissal was warranted here where All American did absolutely nothing for four months after filing its notice of appeal.

Moreover, All American's total inaction during the four months subsequent to the dismissal further justifies the dismissal. Indeed, as of the date of the filing of its motion to reinstate its appeal, All American neither had made arrangements to pay for its share of the transcript so as to cure the default nor had responded to the Fifth Circuit's warnings. (App. K at A-30).

Further, dismissal of All American's appeal need not rest solely on its failure to order and make financial arrangements to pay for a transcript. Rather, dismissal also was warranted pursuant to Rule 31 of the Federal Rules

of Appellate Procedure for failure to timely file its brief. According to the scheduling order, All American's brief was due on or about October 6, 1987. All American, however, neither timely filed its brief nor sought an extension of time within which to do so. It simply did nothing.

That the other appellants timely sought and obtained extensions of time within which to file their brief provides no comfort to All American. To the contrary, it is well established that where multiple parties appeal, *each* appellant must comply with the requirements for prosecuting an appeal absent a joint appeal. *Woody v. Hinkle Contracting Corp.*, 59 F.R.D. 543 (E.D. Ky. 1973). (If more than one appeal is taken, *each* appellant shall comply with the provisions of Rule 10(b) and this subdivision . . . ; Fed. R. App. P. 11(a)). All American, which neither filed a motion for extension of time nor sought to join in the motions of the other appellants, cannot benefit from the filing of their motions. Accordingly, as of the date All American filed for reinstatement, its brief was two months overdue.

Failure to timely file a brief is ground for dismissal of an appeal. In *Louisiana World Exposition v. Logue*, 746 F.2d 1033, 1038 (5th Cir. 1984), appellants' appeal was dismissed for failure to timely file their brief. The court reasoned that by not filing their brief, appellants abandoned their appeal. *Id.* at 1038. *Accord, Tidwell v. Dees*, 464 F.2d 1297 (5th Cir. 1972) (pro se appellant's appeal dismissed for failure to timely file brief).

Such reasoning equally applies here. All American took absolutely no action for eight months after filing its notice of appeal. It failed to timely arrange to order

and pay for its share of the transcript. It failed to move to reinstate its appeal dismissal for four months. It failed to timely file its brief, seek an extension within which to do so, or join in the motions filed by the other appellants. As of the date it filed its motion seeking reinstatement, it still had not complied with the rules requiring it to order and arrange to pay for its share of the transcript. It still has not even attempted to file its brief. Under such circumstances, All American should be considered as having abandoned its appeal. Dismissal of its appeal, therefore, was proper.

b. The Fifth Circuit Properly Denied Reinstatement.

The Fifth Circuit also properly denied reinstatement. All American first sought to reinstate its appeal six months after being warned of possible dismissal, four months after dismissal, and only two days before the briefs of the other appellants were due. All American's request came too late and, therefore, properly was denied.

The Fifth Circuit's Rules provide an appellant fifteen days after receipt of notice of possible dismissal for want of prosecution within which to cure the default. 5th Cir. Loc. R. 42.3.1.1. Pursuant to this Rule, All American had to cure its default by July 1, 1987, which was fifteen days from the date notice of possible dismissal was given.

All American failed to cure the default within the fifteen day period. More importantly, All American failed to promptly cure the default after dismissal on August 19, 1987. Indeed, All American waited six months after receipt of the notice of possible dismissal, four months

after dismissal, and two months after its brief was due to take any action to reinstate the appeal. All American's dilatory actions are inexcusable. Under such circumstances, All American's request for reinstatement was untimely.

More importantly, All American offered no justifiable excuse for its flagrant and total disregard of the rules as is required to recall a mandate. 5th Cir. Loc. R. 41.2. The original explanation offered for All American's egregious violations was its unverified contention that eight months were required to resolve its fee and cost arrangements with counsel. Pretermitting for the moment the specious nature of All American's contention, it offered no evidence to substantiate it. All American offered no evidence of any inability to pay fees or costs. Indeed, the evidence adduced at trial established that All American, which was a Bermuda corporation formed to do the transaction at issue and which engaged in no other business, had in excess of $700,000 in its bank account in Bermuda at the time of trial. (App. C at A-18). Surely, this amount is sufficient to obtain competent counsel. In any event, well established procedures exist to enable a party having alleged financial difficulties to proceed on appeal without advancing fees and costs. Fed. R. App. P. 24. These procedures, however, do not permit a party to ignore its appeal for eight months until it determines to proceed.

Abandoning its original excuse, All American argued in a subsequent motion that it somehow was confused because of the filing of several motions. All American's argument simply is unbelievable. No justifiable excuse was established.

In addition to failing to establish a justifiable excuse, All American offered no authority for reinstating an appeal four months after dismissal, nor can it. Respondents found no case which authorizes reinstatement of an appellant's appeal where the appellant took absolutely no action for eight months to perfect its appeal. Nor is there authority for reinstating an appeal dismissed four months earlier where the party failed to promptly move for reinstatement. To the contrary, a failure to timely move for recall of a mandate militates against recall. *Hines v. Royal Indemnity Co.*, 253 F.2d 111 (6th Cir. 1958) (appelant's unjustified failure to move to recall mandate for eight months militates against recall). In short, no basis in fact or law warranted reinstatement of All American's appeal at such a late date. The Fifth Circuit, therefore, properly denied reinstatement.

All American argues that its appeal should have been reinstated because there was no showing of prejudice. Respondents deny that a showing of prejudice is required to enable a circuit court to dismiss the appeal of an appellant who fails to comply with its prosecutorial obligations. To hold otherwise would divest the circuit courts of control of their dockets.

In any event, respondents established prejudice. Respondents established that reinstatement of All American's appeal at such a late date would delay resolution of an appeal already pending for eight months. Indeed, as of the date the Fifth Circuit first denied reinstatement, the remaining appellants had filed their brief, and respondents' counsel were diligently working to timely prepare their brief addressing the issues of the other appellants.

To have required respondents at that late date to refocus their efforts to oppose the additional appeal of All American would have required respondents to request additional time to prepare their brief, causing further unwarranted delay. Such delay would have been prejudicial to respondents and unjustified, particularly in view of All American's flagrant and total disregard of the court's rules.

Respondents also would have been and will be prejudiced by a late reinstatement of All American's appeal. At the time All American first sought reinstatement, four months had lapsed since the dismissal. Based on the dismissal of All American's appeal four months earlier, All American's failure to timely file its brief two months earlier, and All American's inaction in prosecuting its appeal since filing a notice, respondents already had taken steps to execute on their judgment against All American, which steps include arranging for the sale of certain assets of All American presently held under seizure pursuant to a writ of attachment filed by respondents. In moving to execute on their judgment, respondents were entitled to rely on the dismissal for failure to prosecute entered four months earlier, All American's failure to timely file its brief two months earlier, and All American's general inaction since filing the notice of appeal eight months earlier. A prevailing party is not required to wait indefinitely to execute on a judgment against a party whose appeal has been dismissed over four months earlier. Considering the foregoing, the Fifth Circuit properly denied reinstatement.

The case of *Marcaida v. Industrial Indemnity Ins. Co.*, 569 F.2d 828 (5th Cir. 1978), cited by All American,

does not require a contrary conclusion. There, the court held that where the appellant did not complain, a mere delay of seven days in filing a brief did not justify dismissal. Here, in contrast, respondents as well as one of the appellants did complain of the total inaction of All American that extended far beyond a seven day delay.[8]

All American also argues for the first time that by attempting to require it to comply with the rules, the Fifth Circuit somehow discriminated against it. Specifically, All American contends that because respondents filed a cross-appeal, they should have been made to bear 50% of the transcript cost, notwithstanding that there were four appellants. According to All American, the failure to impose the 50% cost on respondents constitutes discrimination. Significantly, All American cites no authority supporting its contention that cross-appellants must bear one-half of the transcript costs. The argument is specious.

Similarly meritless is All American's argument pertaining to Valley Forge's alleged failure to pay its share of the transcript cost. Valley Forge is the liability insurer of appellant Wright, Lindsey & Jennings and only is present in the suit pursuant to the Louisiana Direct Action Statute permitting insurance companies to be named directly. Throughout the proceedings below, until after the filing of the notices of appeal and transcript orders, Valley Forge and its insured were represented by the same

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[8] Fryar's counsel first complained to the Fifth Circuit regarding All American's failure to agree to pay its share of the transcript costs after the transcript had been ordered, advising the Clerk that Fryar would not agree to an increase in his costs because of All American's failure. (Petitioner's App. H at A-24).

counsel. Although separate counsel ultimately was retained, one counsel prepared the brief for both appellants (with the exception of a five page brief considering coverage issues) and one counsel argued for both appellants at oral argument. To attempt to characterize Valley Forge and its insured as two distinct appellants is misleading.

In any event, if All American was discriminated against by the failure to require Valley Forge to bear a pro rata share of the costs, it should have complained earlier when first admonished by the Fifth Circuit. Its failure to timely do so precludes reinstatement of the appeal. *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 277-278 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950, 92 S. Ct. 2042 (1972) (power to recall mandates should not be availed of for the purpose of changing decisions out of time even assuming the wisdom of the decision entered has become doubtful). Thus, the wisdom of the Fifth Circuit's decision dismissing the appeal is irrelevant at this late date.

———o———

X.

CONCLUSION

The Court lacks jurisdiction to consider All American's untimely petition filed eleven months after dismissal of its appeal and six months after the second order denying reinstatement.

Further, All American has failed to establish entitlement to the extraordinary remedy of mandamus. Finally,

the Fifth Circuit properly dismissed and denied reinstatement of All America's appeal.

Respectfully submitted,

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28 U.S.C. § 2101. Time for Appeal.

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been

rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

Supreme Court Rule 20. Review on Certiorari—Time for Petitioning.

.1. A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals or a decision of the United States Court of Military Appeals (see 28 U.S.C. Sec. 1259) rendered after June 1, 1984, shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

.2. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U.S.C. § 2101(c).

.3. The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4. The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

.5. A cross-petition for writ of certiorari shall be deemed in time when it is filed as provided in paragraphs .1, .2, and .4 of this Rule or in Rule 19.5. However, no cross-petition filed untimely except for the provision of Rule 19.5 shall be granted unless a timely petition for writ of certiorari of another party to the case is granted.

.6. An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 21.1, subparagraphs (e) and (h)), the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42, and 43. Such applications are not favored.

Federal Rule of Appellate Procedure 3(a). Notice of Appeal.

An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

Federal Rule of Appellate Procedure 10(b). Ordering Transcript.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript or other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

Supreme Court Rule 26. Considerations Governing Issuance of Extraordinary Writs.

The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.

Supreme Court Rule 27. Procedure in Seeking An Extraordinary Writ.

.1. The petition in any proceeding seeking the issuance by this Court of a writ authorized by 28 U.S.C. §§ 1651(a), 2241, or 2254(a), shall comply in all respects with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46. The petition shall be captioned "In re (name of petitioner)." All contentions in support of the petition shall be included in the petition. The case will be placed upon the docket when 40 copies, with proof of service as prescribed by Rule 28 (subject to paragraph .3(b) of this Rule), are filed with the Clerk and the docket fee is paid. The appearance of counsel for the petitioner must be entered at this time. The petition shall be as short as possible, and in any event may not exceed 30 pages.

.2. (a) If the petition seeks issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, it shall identify by names and office or function all persons against whom relief is sought and shall set forth with particularity why the relief sought is not available in any other court. There shall be appended to such petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and such other papers as may be essential to an understanding of the petition.

(b) The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 21. The petition shall be served on the judge or judges to whom the writ is sought to be directed, and shall also be served on every other

party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, within 30 days after receipt of the petition, may file 40 copies of a brief or briefs in opposition thereto, which shall comply fully with Rules 22.1 and 22.2, including the 30-page limit. If the judge or judges concerned do not desire to respond to the petition, they shall so advise the Clerk and all parties by letter. All persons served pursuant to this paragraph shall be deemed respondents for all purposes in the proceedings in this Court.

.3. (a) If the petition seeks issuance of a writ of habeas corpus, it shall comply with the requirements of 28 U.S.C. § 2242, and in particular with the requirement in the last paragraph thereof that it state the reasons for not making application to the district court of the district in which the petitioner is held. If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted his remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, it must be shown that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers and that adequate relief cannot be had in any other form or from any other court. Such writs are rarely granted.

(b) Proceedings under this paragraph .3 will be *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. If a response is ordered,

it shall comply fully with Rules 22.1 and 22.2, including the 30-page limit. Neither denial of the petition, without more, nor an order of transfer under authority of 28 U.S.C. § 2241(b), is an adjudication on the merits, and the former action is to be taken as without prejudice to a further application to any other court for the relief sought.

.4. If the petition seeks issuance of a common-law writ of certiorari under 28 U.S.C. § 1651(a), there may also be filed, at the time of docketing, a certified copy of the record, including all proceedings in the court to which the writ is sought to be directed. However, the filing of such record is not required. The petition shall follow insofar as applicable, the form for a petition for certiorari prescribed by Rule 21, and shall set forth with particularity why the relief sought is not available in any other court, or cannot be had through other appellate process. The respondent, within 30 days after receipt of the petition, may file 40 copies of a brief in opposition, which shall comply fully with Rules 22.1 and 22.2, including the 30-page limit.

.5. When a brief in opposition under paragraphs .2 and .4 has been filed, or when a response under paragraph .3 has been ordered and filed, or when the time within which it may be filed has expired, or upon an express waiver of the right to file, the papers will be distributed to the Court by the Clerk.

.6. If the Court orders the cause set down for argument, the Clerk will notify the parties whether additional briefs are required, when they must be filed, and, if the

case involves a petition for common-law certiorari, that the parties shall proceed to print a joint appendix pursuant to Rule 30.

Fifth Circuit Local Rule 42.3.2

In all other appeals when appellant fails to order the transcript or fails to file a brief or otherwise fails to comply with the rules of the Court, the Clerk shall enter an order dismissing the appeal for want of prosecution.

Federal Rule of Appellate Procedure 31. Filing and Service of Briefs.

(a) *Time for Serving and Filing Briefs.* The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

(b) *Number of Copies to Be Filed and Served.* Twenty-five copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser number, and two copies shall be served on counsel for each party separately represented. If a party is allowed to file typewritten ribbon and carbon copies of

the brief, the original and three legible copies shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented.

(c) *Consequence of Failure to File Briefs.* If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the court.

(As amended Mar. 30, 1970, eff. July 1, 1970; March 10, 1986, eff. July 1, 1986.)

Federal Rules of Appellate Procedure 11(a). Duty of Appellant.

After filing the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. A single record shall be transmitted.

Fifth Circuit Local Rule 42.3.1.1

Appeals With Counsel. If appellant is represented by counsel, appointed or retained, the Clerk shall issue a notice to counsel that, upon expiration of 15 days from the date thereof, the appeal may be dismissed for want of prosecution unless prior to that date the default is remedied, and shall enter an order directing counsel to show cause within 15 days from the date thereof why disciplinary action should not be taken against counsel. If the default is remedied within that time the Clerk shall not dismiss the appeal and may refer to the Court the matter of disciplinary

action against the attorney. If the default is not remedied within that time the Clerk may enter an order dismissing the appeal for want of prosecution or may refer to the Court the question of dismissal. The Clerk shall refer to the Court the matter of disciplinary action against the attorney. The Court may refer the matter of disciplinary action to a District Judge to act as a special master.

Fifth Circuit Local Rule 41.2

Recall of Mandate. A mandate once issued shall not be recalled except to prevent injustice.

Federal Rule of Appellate Procedure 24. Proceedings in Forma Pauperis.

(a) *Leave to Proceed on Appeal in Forma Pauperis From District Court to Court of Appeals.* A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an

action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.

(b) *Leave to Proceed on Appeal or Review In Forma Pauperis In Administrative Agency Proceedings.* A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the United States Tax Court) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly

in a court of appeals, shall file in the court of appeals a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of (a) of this Rule 24.

(c) *Form of Briefs, Appendices and Other Papers.* Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; March 10, 1986, eff. July 1, 1986.)

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EDWARD C. ABELL, JR. AND
CAREY WALTON

Plaintiffs/Appellees

VERSUS NUMBER 87-4260

JOE E. FRYAR,

Defendant/Appellant

MOTION FOR REINSTATEMENT OF APPEAL

Now comes defendant-appellant, ALL AMERICAN SERVIVES COMPANY, LTD., by and through undersigned counsel, and for this, its motion to reinstate appeal, states as follows:

1.

Movant herein, filed a timely Notice of Appeal in the above entitled action on April 22, 1987. Undersigned counsel filed the Notice of Appeal as a courtesy for the mover pending resolution of negotiations regarding attorney fee and expenses. The issue of fee and expenses has finally been resolved.

2.

In the interim, attorneys for the plaintiff requested that this Honorable Court dismiss the appeal of the mover in that arrangements had not been made with the court reporter of the district court to order the transcript, pursuant to F.R.A.P. 42, Local Rule, 42.3.2. By Order of

August 19, 1987, the clerk of the court of appeal in fact did dismiss the appeal of All American Services Company, Ltd.

3.

In the intervening time since the dismissal of All American's appeal, numerous motions have been filed by the other parties herein, and considered by the district court and the court of appeals.

4.

In addition, the record has been lodged; the transcript prepared; and it is currently making the rounds to all counsel for preparation of briefs, which undersigned counsel understands are due on or before December 6, 1987.

5.

Upon information it is believed that in order to have the appeal of All American reinstated, All American will have to make arrangements to pay to either the court reporter or counsel for other appellants to pay its prorata share of the cost of the transcript filed with the court. Those arrangements are being made.

6.

In that it is alleged that there will be no prejudice to any of the parties to the appeal if the appeal of All American is reinstated, it is respectfully submitted that this court should enter an order reinstating the appeal of All American once all fees and costs are ascertained and paid.

WHEREFORE, ALL AMERICAN SERVICES COMPANY, LTD. respectfully moves this court to enter an

order reinstating the appeal of All American Services Company, Ltd.

Respectfully submitted,

CHRIS J. ROY
(A LAW CORPORATION)

BY: /s/ Leslie R. Leavoy, Jr.
Leslie R. Leavoy, Jr.
711 Washington Street
Alexandria, Louisiana 71301
(318) 487-9537

CERTIFICATE

I hereby certify that a copy of the above and foregoing Motion for Reinstatement of Appeal has been furnished to all counsel by placing same in the United States mail properly addressed with sufficient postage on this 2nd day of December, 1987.

Alexandria, Louisiana.

/s/ Leslie R. Leavoy, Jr.
OF COUNSEL

APPENDIX B

MOTION FOR RECONSIDERATION OF MOTION FOR REINSTATEMENT OF APPEAL AND/OR ALTERNATIVELY, MOTION FOR SUSPENSION OF RULES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 2

NOW COMES defendant/appellant, All American Services, Ltd., by and through undersigned counsel, and respectfully requests this court to reconsider the motion for reinstatement of the appeal of All American Services, Ltd., and/or alternatively, motion for suspension of rules pursuant to Federal Rule of Appellate Procedure 2 for the reasons that appear in the memorandum filed with this motion.

Respectfully submitted,

/s/ Leslie R. Leavoy, Jr.

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been furnished to all counsel of record by placing same in the United States mail properly addressed with sufficient postage on this 11th day of January, 1988.

/s/ Leslie R. Leavoy, Jr.
OF COUNSEL

APPENDIX C

January 20, 1987 Transcript of Trial Proceedings (pp. 12-13). Testimony of Janice Stephens.

* * *

Q That was in October of 1986?

A That's correct.

Q At that time, was any interest paid on the $800,000.00 in bonds?

A Yes. There were funds to pay a total of a hundred one thousand three eighteen forty on that eight hundred thousand at the time that those bonds are exchange had for register.

Q Prior to that date have any interest payments been made, to your knowledge, on the $800,000.00 in bonds?

A Prior to that date?

Q Prior to the October, '86 payment of a hundred thousand?

A I have one check that was found on the Bossier Bank & Trust records that shows on October 20th, 1983 fifty-six thousand which would have been one interest payment on eight hundred thousand at fourteen percent.

* * *

THE WITNESS: Yes, sir. This wire transfer that paid this fifty-six thousand shows that it was paid on 10/20/83 to Colonial Development, and it lists the same bond numbers that they turned in for the registered bonds.

* * *

APPENDIX D

March 26, 1987 Ruling on Motions for Judgment Notwithstanding the Verdict and Motions for New Trial (pp. 16, 19, 20, 27)

* * *

(page 16) Substantial evidence was adduced at trial from which a reasonable jury could infer the existence of a scheme or artifice to defraud. It is obvious that Fryar caused All American to be organized for the express purpose of concealing that a profit in excess of $2 million was to be made on the sale of the Cheneyville property. Fryar was the only party in contact with All American, and it was Fryar who caused the documents necessary to effectuate the scheme to be mailed to All American and to other parties involved in the transaction.

The evidence at trial abundantly supported the jury's finding that Fryar violated Section 1962(a) of the RICO Act. It is clear that Fryar and All American derived in excess of $2 million from the pattern of racketeering activity which resulted from the issuance of the Westside bonds. It is also well established that at least $2.4 million of the racketeering monies was used by Fryar and All American to acquire an interest in Westside by the purchase of Westside bonds, and that at least part of the proceeds of that investment, the interest payments, were paid to Fryar, who was operating Westside.

(pp. 19-20) Fryar fomented more fraud to assure the success of his scheme. To secure performance of his obligations as developed under the Development Agreement, Fryar agreed to purchase and to pledge bonds in an aggregate principal amount of $2 million. Fryar thus appeared

to have $2 million of his *own* funds at risk, as security for the performance of his obligations, an appearance he expressly included in the Summary Memoranda, the "Red Herring", and other sales circulars which were distributed to potential investors.

Fryar then grossly inflated the price to be paid by Westside so that over $2 million would be realized from the bond proceeds, which profit would be used to purchase the $2 million of bonds Fryar was required to pledge as security. Structuring the transaction in this manner relieved Fryar of the obligation to put his own funds at risk to secure his performance. It also enabled Fryar and All American to receive a substantial additional profit in the form of the bonds. Fryar's and All American's assertions that the payment to All American of $2,459,000 was payment for All American's assumption of Fryar's obligations pursuant to the Development Agreement is completely belied by the evidence adduced at trial. As was indicated above, these pseudo-obligations on the part of All American were set forth in a *copy* of a resolution, with no available original, which resolution was not produced during discovery and which mysteriously appeared during the course of the trial.

* * *

(page 27) Moreover, as the court discussed above, evidence presented by defendants to prove All American's obligations on behalf of Joe Fryar in consideration for All American's receipt of $2,459,000 for a piece of property that cost it $150,000, was a letter from All American Services Co., Ltd., which letter mysteriously appeared, dated November, 1981, agreeing in part to buy the property *which it had already purchased in August of 1981.* An-

other document relied upon by defendant Fryar was a copy of a resolution of All American Services Co., Ltd., setting forth All American's obligations. No original of this document could be found and the document was not produced when plaintiffs' first demanded it during discovery. This document is very strange in view of the fact that Mr. Chambers, who was President of All American, testified by deposition prior to his death that the only obligation that All American owed to Joe Fryar was to pledge the $2 million in bonds to the trustee for Westside to secure Fryar's obligation.

* * *

APPENDIX E

Desposition of Maxwell Lowrey Quin taken October 27, 1986 (Vol. I, p. 133)

* * *

Q. But as you understood its purpose, it was solely for purposes of the Westside transaction.

A. Correct.

Q. And it's had no other business other than that transaction?

A. Not to my knowledge.

* * *

APPENDIX F

Deposition of Patricia Lodge taken January 19, 1987 (pp. 42-43, 45)

Q. But again, there was no other employee in the office other than yourself?

A. No.

* * *

Q. And am I correct that there are no other employees of All American Services Company, today, other than you?

A. That is right.

* * *

Q. After you assumed your job as secretary to Mr. Chambers in January of 1983, did you become familiar with that transaction at all?

A. No, I didn't.

Q. Have you, at any time up to and including today, been made aware of the transaction?

A. I am aware of it, but I don't fully understand it. I don't even pretend to understand it.

APPENDIX G

Deposition of Maxwell Lowrey Quin taken October 27, 1986 (Vol. I, p. 50)

* * *

Q. Can you describe the ownership breakdown for me?

A. Yes. The company is owned by a company called J. Herbert Smithers (spelled phonetically), L T D.

Q. That is a Cayman corporation?

A. Cayman corporation. Yes.

* * *

APPENDIX H

TO MAX RE: FLEMING

THE TRIAL IS A CIVIL ACTION AND OCCURS ON DECEMBER 1, 1986. IT IS NOT CRIMINAL—FLEMING DOES NOT HAVE TO TESTIFY AND SHOULD NOT.

FLEMING SHOULD RESIST BEING DEPOSED. HARGAN IS ACQUAINTED WITH THE CASE AND SHOULD PRESENT HIM. THE FOLLOWING POINTS ARE MADE:

1. A.A. IS AN EXEMPT COMPANY AND SHOULD BE PROTECTED BY BERMUDA'S SECRECY LAWS.
2. FLEMING HAS A DUTY AND OBLIGATION OF CONFIDENTIALITY REGARDING HIS CLIENTS AND BUSINESS RECORDS.
3. FLEMING HAS NO RIGHT TO POSSESS ANY ORIGINALS, COPIES, CORRESPONDENCE, RECORDS OR RECOLLECTIONS PERTAINING TO A.A. AND SHOULD IMMEDIATELY SURRENDER ANY THAT HE HAS TO THE COMPANY AND FORGET ANYTHING THAT HE RECALLS.
4. TESTIMONY RELATIVE TO FUNDING A.A. VIA ANGLO AND FRYAR'S INVOLVEMENT WITH ANGLO WOULD BE VERY DAMAGING TO A.A.'S EFFORTS TO RECOVER THE BONDS.
5. ANY LOSS THAT A.A. SUFFERS BECAUSE OF FLEMING'S RECORDS, TESTIMONY OR VIOLATING THE CONFIDENTIALITY OF A.A.'S BUSINESS WILL CAUSE A.A. TO SEEK ECONOMIC RECOVERY VIA LEGAL ACTION AGAINST FLEMING.

6. IF HE AVOIDS BEING DEPOSED OR UPON BEING DEPOSED, RESPECTS THE CONFIDENTIAL RELATIONSHIP BETWEEN HIMSELF AND A.A., THEN HE CAN EXPECT TO RETAIN A GOOD AND GENEROUS CLIENT. BUT IF HE DIVULGES OUR BUSINESS, THEN IT WILL BE INCUMBENT ON A.A. THRU THE COURTS TO LET HIS PRESENT AND FUTURE CLIENTS KNOW THE LOOSENESS WITH WHICH THEIR BUSINESS DEALINGS ARE HANDELED. THIS WILL HARDLY INSPIRE CONFIDENCE IN CLIENTS OF FLEMING.

J. H. SMITHERS

APPENDIX I

January 21, 1987 Transcript of Trial Proceedings (p. 80)

* * *

THE COURT: Well, I'm just talking. I say, it would have had to have come from Bermuda.

MR. SIMON: Why do you say that?

THE COURT: Where else could it have come from?

MR. WITTMANN: This document I'm talking about that Ms. Lodge identified, this was a letter sent to Kyle Schonekas from Owen Goudelocke—

THE COURT: But my question, before I hear the rest of the evidence, insofar as the jury's concerned, evidence that's relevant and admissible may be excluded because the prejudicial effect outweighs the probative value. Now, this indicates something, and may be very important to other people outside of this, that someone was trying to keep maybe a witness from testifying.

* * *

APPENDIX J

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

August 28, 1987

GILBERT F. GANUCHEAU
Clerk

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No. 87-4260 EDWARD C. ABELL, JR., ET AL.,
—vs— POTOMAS INSURANCE CO.
ETC. ET AL.,

(CA-84-1786 "O")

Pursuant to Rule 12 of the Federal Rules of Appellate Procedure, you are hereby notified that the record on appeal has this day been filed. THE BRIEF FOR APPELLANT AND RECORD EXCERPTS ARE NOW DUE WITHIN FORTY (40) DAYS FROM THIS DATE in accordance with Rule 31 FRAP. See FRAP and Local Rules 28 and 31 as to the content of and time for filing briefs. See Local Rule 30.1 for the contents of the Record Excerpts which are to be filed in lieu of an appendix. Local Rule 42.3.2 allows the clerk to dismiss appeals without notice if the brief is not timely filed.

☐ If the *97* volume record on appeal is needed to prepare your brief, it will be made available to you upon written request.

☐ Enclosed is the original record for your use in preparing your brief and the excerpts above referred to

This record may be forwarded to opposing counsel at the time your brief is served as long as we are informed of its transmission. Opposing counsel will then be required to return the record to this office. Otherwise, you should return the record to this office with your brief. Please note that we are authorized to loan official government records and exhibits only for your convenience. Special care should be taken for their safe handling and return. The willful mutilation, obliteration, or destruction of U.S. Court records in your custody is a criminal act (18 USCA § 2071).

☐ This letter will also serve as a reminder of the Court's plan for expediting criminal appeals wherein you are expected to file your brief within the period fixed by the rules without requesting an extension. FOR THE BENEFIT OF COUNSEL IN MULTIPLE PARTY CASES, ACCESS TO THE RECORD WILL NOT BE CONSIDERED GROUNDS FOR EXTENDING THE TIME FOR THE FILING OF THE BRIEF.

Sincerely yours,

cc. Mr. Phillip A. Wittman

GILBERT F. GANUCHEAU,
Clerk

By: /s/ P. Keller
Deputy Clerk

APPENDIX K

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned notary public, personally came and appeared:

JUDY Y. BARRASSO

who, after being duly sworn, did depose and say that:

1. She is counsel for the plaintiffs in the proceeding: *Edward C. Abell, Jr., et al. v. Potomac Insurance Company of Illinois, et al.* No. 87-4260 presently pending in the Fifth Circuit Court of Appeals.

2. In that capacity she had a conversation on December 4, 1987, with Connie Ezel, the court reporter responsible for transcribing the trial of this matter which was held in the Opelousas division of the Western District of Louisiana.

3. During this conversation on December 4, 1987, Ms. Ezel advised that as of that date All American had not made arrangements to pay for its share of the transcript of these proceedings.

/s/ Judy Y. Barrasso
Judy Y. Barrasso

Sworn to and subscribed before me
this 9th day of December, 1987.
/s/ David J. Lukinovich
Notary Public